SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., and NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF

Of Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.

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PRELIMINARY STATEMENT.

The respondents, Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, state to the Court that they adopt as their statement of the case the statement set out in the briefs of the respondents, Central Hanover Bank & Trust Company, as trustee, and Chase National Bank of the City of New York, trustee, etc., heretofore filed in this case.

ANSWER TO PETITIONER'S SPECIFICATIONS OF ERROR.

On pages 9 and 10 of petitioner's brief he has set out his specifications of error A, B, C, D and E. Specifications A to D, inclusive, go to the merits of the decision of the Circuit Court of Appeals and are not within the scope of this review, since the order entered by this Court on October 9, 1939, granting the petition for a writ of certiorari, was

> "limited to the question of the right of the petitioner to intervene in order to assert priority."

We do not believe it was the intent or the purport of this Court's order to at this time go into all the questions dealing with the merits of the case presented by petitioner's specifications of error A to D. This Court saw fit to limit the scope to a specific question, and the attempt of the petitioner to bring before this Court extraneous matters does not, in our opinion, make argument on these points necessary.

Specification of error E, which is the only one of the specifications pertinent at this time, states:

> "The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, a discretion to deny petitioner leave to file the petition which, on January 26, 1938, he presented and applied to said District Court for leave to file in said receivership proceeding."

Our argument will be limited to this specification.

ARGUMENT.

I.

The Record in This Case Shows That the Trial Court Properly Denied Petitioner Leave to File His Intervening Petition.

It is our understanding that no absolute right of intervention exists unless such intervention is necessary and indispensable to the enforcement of substantial legal rights of the intervener. If no substantial legal rights are prejudiced by a denial of intervention, the ruling is within the discretion of the trial court and not appealable. The burden is upon the petitioner to make it clearly appear that his rights will be lost to him by the refusal of a right to intervene. The cases where it is held that a right to intervene is absolute and a denial of the intervention by the trial court would be appealable are limited to those where the intervention is indispensable to the preservation or enforcement of the claim of the petitioner and where he is not already being fairly represented in the litigation. In the present case, before it could be held that the petitioner's petition should be granted as a matter of right, it is necessary that he show that he has a substantive right which would be lost if he were not allowed to intervene and that he was not at that time being fairly represented by those who were parties to the suit.

It is necessary, in order to see if the petitioner has sustained this burden, to examine the proceedings in the District Court to determine whether at the time petitioner's petition for leave to file his intervening petition was filed it was necessary and indispensable that he be made a party to protect his rights. In other words, was the denial by the trial judge of petitioner's petition to

intervene such as to be a denial of certain relief to which he was entitled and which could only be obtained by allowing him to intervene?

The District Court, which had appointed the Receivers who are respondents here, was of course familiar with the parties, the various claimants, the numerous equities involved, and the status of the case at the time petitioner filed his petition for leave. The District Court, in its conclusions of law (Record p. 83), said of this petition:

> "The granting of leave to intervene will merely serve to encumber and delay the orderly process of these cases toward a reorganization of the properties of the defendant railroad company."

The Circuit Court of Appeals, in affirming this finding of the District Court, stated:

> "In denying the application to intervene we cannot say that discretion has been abused. Appellant has disclosed no legal interest as a claimant that has not already been recognized, and may not be realized in the orderly process without the drastic disorganization contemplated and prayed in the petition sought to be filed."

The courts below point out that the petitioner had in no way brought himself within that class of persons to whom intervention must be granted as a matter of right. At the time his petition to intervene was filed the reorganization of the Wabash Railway Company was progressing in an orderly manner. The rights of all claimants, including this petitioner, had been safeguarded. The order appointing the Special Master had protected the rights of claimants of every type. There is no evidence in this record that any fraud, discrimination or unfair procedure had been practiced against this petitioner nor that his full rights were not protected at all times. Further, there is a complete failure of proof of any loss that he has suf-

fered or will suffer by reason of the refusal of the trial court to allow him to intervene.

The decision of this Court in the case of City of New York v. New York Telephone Co., 261 U. S. 312, 316, states the law as it was applied to a state of facts very similar to those in the present case:

> "There is nothing in this case to show that the Public Commission will not fully and properly represent the subscribers resident in New York City. Indeed it was said at the bar that the City and the Public Commission and the Attorney General were co-operating in every way in the defense of the suit. It was completely within the discretion of the District Court to refuse to allow the City to become a defendant when its interests and those of its residents were fully represented under the law and protected by those who had been made defendants. There is nothing to show that the refusal complained of was an abuse of discretion. This same controversy arose in the case of the City of New York v. Consolidated Gas Co., 253 U. S. 219, and the same conclusion was reached. Indeed it was there said that an order like the one here objected to was not of such a final character as to furnish the basis of an appeal, citing Ex parte Cutting, 94 U. S. 14, 22; Credits Commutation Co. v. United States, 177 U. S. 311, 315; Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578, 581. These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, but the present is not one of them."

II.

Any Question Concerning the Applicability or Validity of Amended Subsection (n) of Section 77 of the Bankruptcy Act Cannot Properly Be Determined by This Court on the Present Record.

The petitioner seems to feel that what is before the Court at the present time is not to be limited to the specific question set out in this Court's order granting the petition for a writ of certiorari, namely, the error of the Circuit Court of Appeals in sustaining the District Court's refusal to allow the petitioner to intervene to assert priority, but includes also the effect the amendment of Subsection (n) of the Railroad Reorganization Act on August 11, 1939, will have on this proceeding. The petitioner's position apparently is that the District Court should have allowed him to intervene on January 26, 1938, at which time his original application for leave to intervene was filed in the District Court, because on August 11, 1939, an amendment to the Bankruptcy Act, which he claims has affected his rights, was passed. Obviously, the District Judge, when he denied the intervention, and the Circuit Court of Appeals, when it affirmed the action of the District Judge on May 13, 1939, did not and could not consider the effect, if any, this amendment would have on the claim of petitioner. Of course, this question is not before this Court at the present time.

The sole question now to be determined is whether or not the trial judge, acting only upon the facts which were before him at the time he made the order, erred in denying the petitioner the petition to intervene. The amendment to the Bankruptcy Act may or may not affect the present rights of the petitioner, and it seems apparent that if this act had been in effect on January 26, 1938, the petitioner

would not have considered it necessary to seek leave to file his elaborate petition to set aside and dismiss the receivership proceedings, because if he had any rights based on the amendment to the Bankruptcy Act they could, and doubtless would, have been completely asserted in the general receivership proceedings. The record sustains the correctness of the Circuit Court of Appeals and the District Court in ruling against the petitioner on this point.

Respondents therefore respectfully submit to this Court that the petitioner has not sustained the burden of showing that at the time his petition to intervene was denied he suffered a prejudice to any substantial legal right, and that the orders of the District Court and the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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